ORIGINAL

No. 85-6756

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, JAMES ERNEST HITCHCOCK, pursuant to the authority of Rule 22.6, Rules of the Supreme Court of the United States, files his supplemental brief to call attention to an intervening decision not available at the time of filing his petition for writ of certiorari, in the above-styled cause.

DISCUSSION

Mr. Hitchcock calls attention to the Court's decision in Skipper v. South Carolina, No. 84-6859, decided April 29, 1986, as it bears upon the questions presented in Parts I and II of his petition for writ of certiorari filed April 18, 1986.

In his capital sentencing trial, Skipper had been precluded from introducing "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail." Slip opinion at 1-2. Skipper and his former wife had been permitted to testify "briefly" that

> petitioner had conducted himself well during the seven-and-one-half months he spent in jail between his arrest and trial. Petitioner also testified that during a prior period of incarceration he had earned the equivalent of a high school diploma and that, if sentenced to life imprisonment rather than to death, he would behave himself in prison and would attempt to work so that he could contribute money to the support of his family.

Slip opinion at 1.

The Court found that the exclusion of the testimony of the two jailers and the regular visitor violated the Eighth Amendment mandate of individualized sentencing, despite Skipper having been permitted to present similar evidence concerning his good custodial behavior through his own testimony and that of his former wife. The Court strongly reaffirmed the Eighth Amendment principles of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) that "'"the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense..."'" and that "the sentencer may not ... be precluded from considering 'any relevant mitigating evidence.'" Slip opinion at 2-3 (quoting Eddings, 455 U.S. at 110, 114 (original emphasis)).

The Skipper decision supports the appropriateness of certiorari review in this case, for it makes clear the error in the ruling of the court of appeals below. First, as a general matter, Skipper reaffirms the Court's strong commitment to assuring that the Lockett and Eddings mandate is followed, in sharp contrast to the en banc majority's failure to settle the substantive and recurring Eighth Amendment question concerning the pre-Lockett application of Florida law. Second and more particularly to the court of appeals' reasoning, Skipper directly contradicts the underlying premise of the en banc majority's decision: that a Lockett violation can occur only if the excluded evidence was of a different kind than the evidence that had been introduced.

As discussed in detail at pages 14-18 of Mr. Hitchcock's petition for writ of certiorari, the court of appeals majority rested its rejection of Mr. Hitchcock's Eighth Amendment claim upon its conclusion that the "presentation to the jury" would not have been "appreciably different" had counsel not been con-

strained in presenting and arguing mitigating evidence by the restrictive application of the Florida statute. The majority said that the evidence excluded by that process "was developed ... to some extent for the jury." There are two flaws in the court of appeals' reasoning that are shown by Skipper. First, Skipper makes clear that Lockett error occurs by the preclusion of consideration of evidence as an independent mitigating factor and not merely by the exclusion of the evidence altogether. This is in contrast to the court of appeals' narrow construction of Lockett. Second, the Skipper decision expressly rejects the reasoning of the court of appeals below that no Lockett violation occurs unless evidence of a different kind than that presented was excluded from the sentencing process.

Skipper had presented evidence concerning his good conduct and positive accomplishments while incarcerated. Nevertheless, the Court found an Eighth Amendment violation in the exclusion of the same kind of evidence -- evidence that Skipper "has made a good adjustment" to incarceration. The Court specifically rejected the argument that the excluded testimony was "merely cumulative," slip opinion at 6, reaffirming the principle of Lockett that no relevant mitigating evidence may be precluded from consideration as an independent mitigating factor.

The eleventh circuit majority followed reasoning directly opposite to Skipper in rejecting Mr. Hitchcock's Eighth Amendment claim. That court said that since the excluded mitigating evidence "was developed ... to some extent for the jury," 770 F.2d at 1517-18 (emphasis supplied), there was no Eighth Amendment violation. Had the court of appeals decided Skipper therefore, it would have rejected the claim since the excluded evidence was developed "to some extent" for the sentencer. Just as in Skipper, however, the excluded evidence in the present case was highly "relevant to the sentencing determination." Slip opinion at 5-6. As detailed briefly in the certiorari petition (at pages 19-21), factors excluded from consideration as mitigating circumstances involved evidence of Mr. Hitchcock's family and social history and of his potential for rehabilitation and

likelihood of functioning well in prison, all of which "might serve 'as a basis for a sentence less than death.'" Slip opinion at 3.[1] Thus, in the same manner as Skipper the authoritative application of the Florida Statute to preclude consideration of relevant mitigating factors "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Slip opinion at 7.

Accordingly, the court of appeals majority has rested its decision rejecting relief in this case upon a premise that is in direct conflict with the Court's decision in Skipper v. South Carolina.

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1 As discussed in the certiorari petition, only a few brief biographical "facts" made it into evidence before the jury, and even this data was not considered as independently mitigating since all that was possible under the restrictive application of the statute was an attempt to shoehorn that data into a statutory mitigating factor. Even so, the available evidence that was excluded from the process, as proffered by Mr. Hitchcock in the habeas proceedings, was not only more detailed in nature, but was also more credible and persuasive. For example, the proffered testimony of the psychologist as to Mr. Hitchcock's character ("bright, articulate, capable of insight") and his ability to "not only ... function well but ...[to] be a positive influence [in prison]," see certiorari petition at 21 n.21, "would quite naturally be given much greater weight by the jury." Skipper, slip opinion at 7. Thus, just as in Skipper this additional, relevant mitigating evidence presented through "more disinterested witnesses" could not be characterized as "merely cumulative." Slip opinion at 6-7.

CONCLUSION

For the foregoing reasons together with those set out in the petition for writ of certiorari, petitioner respectfully submits that the writ of certiorari should issue.

Respectfully submitted,

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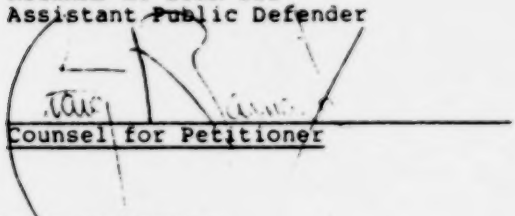
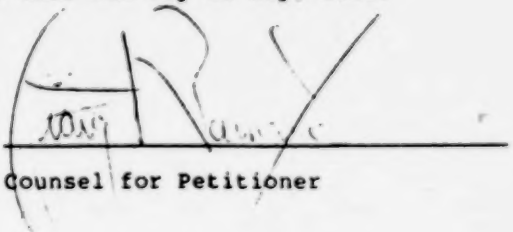


Counsel for Petitioner

CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, certify that I am a member of the Bar of this Court and that I have served a copy of tne foregoing Supplemental Brief on counsel for respondent by depositing it in the United States Mail, first-class postage prepaid, addressed to RICHARD W. PROSPECT, Assistant Attorney General, Department of Legal Affairs, 4th Floor Beck's Building, 125 North Ridgewood, Daytona Beach, Florida 32014, this 6th day of May, 1986.



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